NO. 16206

United States
COURT OF APPEALS
for the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a corporation,

Appellant,

v.

H. C. WERNER and TAUF CHARNESKI,

Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon.

HON. GUS J. SOLOMON, Judge.

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SUBJECT INDEX

	Page
Statement of Jurisdiction	1
Statement of the Case	2
Summary of Argument	4
Argument	4
Conclusion	13

INDEX OF AUTHORITIES

Page

Adney v. Mississippi Lime Co. of Missouri, 241 F. 2d 43 (7th) ... 12
Collins v. Wayland, et al, 139 F. 2d 677 (9th) ... 13
Grivas v. Parmelee Transportation Co., 207 F. 2d 334 ... 12
Hoiness v. United States, 335 U.S. 297, 93 L. Ed. 16; also annotations 93 L. Ed. 21 ... 6
Hubbard v. The B. & O. R. R. Co., 249 F. 2d 885 ... 13
Jacobson v. Indianapolis Power & Light Co., 163 F. Supp. 218 ... 9
Mooney v. Central Motor Lines, Inc., 222 F. 2d 569 (6th) ... 13
Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 84 L. Ed. 167, 60 S. Ct. 153, 128 A.L.R. 1437 ... 9
Ockert v. Union Barge Line Corp., 190 F. 2d 303 (3rd) ... 11
Olberding v. Illinois Central R. Co., 346 U.S. 338, 74 S. Ct. 83, 98 L. Ed. 39 ... 10
Piedmont Interstate Fair Ass'n. v. Bean, 209 F. 2d 942 (4th) ... 12
Riley v. Union Pacific R. Co., 177 F. 2d 673, cert. denied 70 S. Ct. 350, 338 U.S. 911, 94 L. Ed. 561 ... 6, 9, 10
Texas Construction Company and U. S. F. & G. Co. v. United States of America for the use of Caldwell Foundry and Machine Company, Inc., 236 F. 2d 138 (5th) (1956) ... 7, 11
Wisdom v. Texas Co., 27 F. Supp. 992 ... 13

RULES

Rule 41(2)(b) Rules of Civil Procedure ... 2, 3, 11, 12, 13

STATUTES

28 U.S.C.A. 1291 ... 2, 9
28 U.S.C.A. 1332 ... 1
28 U.S.C.A. 1391(a) ... 1, 6, 10
28 U.S.C.A. 1406(b) ... 6
40 U.S.C.A. 270(a)(b) ... 2

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Appeal from the United States District Court for the District of Oregon.

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JURISDICTION

This action was commenced in the United States District Court for Oregon, as a diversity case under 28 USCA Sec. 1332 and 28 USCA 1391(a). The plaintiff is a corporation of the State of Washington and defendants are citizens and residents of the State of Oregon residing in the City of Eugene.

The amount in controversy is $140,989.40.

A judgment of dismissal of the action with prejudice was entered on August 5, 1958.

This court acquired jurisdiction under 28 USCA 1291.

STATEMENT OF THE CASE

This appeal involves an action for damages for breach of contracts, and reformation of the contract, under which appellant was to perform certain portions of work which appellees, as prime contractors, had under a contract with the United States government for the construction of an irrigation project near Moses Lake, in the Eastern Judicial District of Washington.

Appellees filed their answer to the complaint. No affirmative relief or counterclaims were sought by appellees.

The action came before the court on the regular call day at which time appellant's counsel moved the court for a dismissal without prejudice and without assigning a reason for its motion to dismiss (Tr. 29-31).

Counsel for appellees opposed the motion. The court directed that the case be tried in Oregon and denied the motion to dismiss.

Thereafter appellant filed a second motion for reconsideration of its motion to dismiss without prejudice, pursuant to Rule 41(a)(2), and, according to the affidavit attached to the motion, it was based upon the premise that appellant desired to file its action on the basis of the Miller Act (40 USCA 270(a)(b). This

affidavit alleged that appellant was under the belief that it was obligatory to bring its action in the United States District Court for the Eastern District of Washington, and not elsewhere. On the reconsideration of the motion the court again denied it and definitely set the case for pretrial conference (Tr. 17-18).

On July 3, 1958 appellants filed a Petition for Writ of Mandamus in the United States Court of Appeals, for the Ninth Circuit, Case No. 16071, against the trial judge, based upon his refusal to allow a voluntary dismissal. The Motion for the Petition for the Writ was denied.

On July 17, 1958 appellant, through its counsel, filed with the United States District Court for Oregon a Notice of Election stating it declined to proceed further with its case (Tr. 19-20).

The action was thereafter set for pretrial conference with notice to appellant to appear, and appellant declined to appear, and upon motion of counsel for appellees (Tr. 23) the court entered an order dismissing the action with prejudice for failure to prosecute with due diligence.

The Specification of Error relates solely to the refusal of the court to allow a voluntary dismissal pursuant to Rule 41(a)(2) of the Rules of Civil Procedure.

SUMMARY OF ARGUMENT

The proper venue of this action was in the District Court for Oregon. It was not an abuse of discretion to deny motion to dismiss because of misapprehension it was obligatory to file action elsewhere.

Miller Act provision that suit be brought in any district in which contract was to be performed and not elsewhere is a restriction on venue rather than on power of court to entertain suit.

ARGUMENT

THE PROPER VENUE OF THIS ACTION WAS IN THE DISTRICT FOR OREGON. IT WAS NOT AN ABUSE OF DISCRETION FOR COURT TO DENY MOTION TO DISMISS BECAUSE APPELLANT WAS UNDER MISAPPREHENSION IT WAS OBLIGATORY TO FILE THE ACTION ELSEWHERE.

There was no abuse of discretion in denying the motion for a voluntary dismissal, after answer was filed, and where the motion was opposed by appellees.

Appellant elected to file its action for damages in the District Court for Oregon where appellees reside, which was the proper venue, and presumably the whole merits of its alleged claim were considered prior to filing.

Upon the initial application for dismissal no cause was assigned in support of the motion. In opposing it, appellees' counsel urged strong and cogent reasons (Tr. 31):

> "Mr. Kobin: We have undertaken at considerable expense to go through this thing and prepare ourselves for our answer and also to prepare our-

selves for trial. And it would be an unreasonable burden, in my opinion, that would be imposed upon the defendants to permit them to come in here without any reason other than they want to dismiss and ask for a dismissal without prejudice, and especially without any conditions attached.

Mr. Humphreys: I don't see that any harm will be done, your Honor.

The Court: The right to be sued in your own community is a valuable right. The motion is denied. The case will be tried in Oregon. I will set it down for pretrial in 30 days, June pretrial."

After denial of the motion, appellant applied for reconsideration, and represented that the filing of the action in the District Court for Oregon (Tr. 34), had been ill considered and since a further study of the facts of the case was made, it was deemed advisable to pursue a remedy under the Miller Act and to join as an additional defendant the surety on appellees' undertaking.

On page 11 of appellant's brief, it is contended:

"The complaint in the Oregon action could not be amended so as to bring in the sureties on the payment bond under the Miller Act, because under the specific provisions of that act (40 U.S.C.A. 270 b.) an action on the bond can only be brought in the district 'in which the contract was to be performed and executed and not elsewhere,' which in this case required the action to be brought in the Eastern District of Washington."

The above reason and objective for dismissal have no basis in law.

Appellant's complaint in this case alleged a cause of action between citizens of different states; it is a

diversity of citizenship action and must be brought in the judicial district where the defendants reside, the principal object under the law is to serve the reasonable convenience of defendants. 28 USCA 1391(a). *Riley v. Union Pac. R. Co.,* 177 F. 2d 673, cert. denied 70 S. Ct. 350, 338 U.S. 911, 94 L. Ed. 561.

A party waives the venue by not objecting. 28 USCA 1406(b). *Riley v. Union Pac. R. Co.,* supra.

MILLER ACT PROVISION THAT SUIT BE BROUGHT IN ANY DISTRICT IN WHICH CONTRACT WAS TO BE PERFORMED AND NOT ELSEWHERE IS A RESTRICTION ON VENUE RATHER THAN ON POWER OF COURT TO ENTERTAIN SUIT.

For a period of time in the past, it was assumed that actions under the Miller Act were required to be instituted in the district court of the district in which the contract is to be performed and not elsewhere, and this was deemed a jurisdictional matter that could not be waived even by consent of the parties. This erroneous assumption had its genesis when the Supreme Court in deciding the case of *United States v. Congress Construction Co.,* 222 U.S. 199, 32 S. Ct. 44, 56 L. Ed. 163, misconceived the distinction between jurisdiction and venue. Since that case was decided the Supreme Court re-examined the question of the power of a court to try a case as distinguished from a venue statute. Cf. *Hoiness v. United States,* 335 U.S. 297, 93 L. Ed. 16; also annotations 93 L. Ed. 21.

A case under the Miller Act may be filed in the judicial district where defendants reside irrespective

of where the contract was to be performed. It is a matter of venue, not jurisdiction. This principle was announced in *Texas Construction Company and U. S. F. & G. Co. v. United States of America for the use of Caldwell Foundry and Machine Company, Inc.*, 236 F. 2d 138 (5th, 1956), where the Court of Appeals, passing upon the question not theretofore decided by any federal court, held that the Miller Act provision that suit can only be brought in the district in which the contract was to be performed and executed and not elsewhere, is a restriction only on venue and not on the power of a court to entertain the suit.

In a well reasoned opinion by Judge Tuttle, Circuit Judge, it was stated:

> ". . . The action was originally filed in the court below relying specifically on the terms of the Miller Act. It also asserted the necessary jurisdictional facts to warrant the bringing of a suit on the grounds of diversity of citizenship, if such a cause of action was pleaded. The principal issue on the original trial was as to the responsibility, and thus legal liability, for certain delays in the performance of the contract sued on. The trial court held in favor of the defendant below, the general contractor, which with its surety, is the appellant here. On appeal to this Court we reversed and remanded to the trial court to enter judgment for the plaintiff, the present appellee.
>
> ". . . This precise question has not been decided by any federal court. The appellants point with confidence to the early case of United States v. Congress Construction Co., 222 U.S. 199, 32 S. Ct. 44, 56 L. Ed. 163, as being determinative of the issue. . . ."
>
> ". . . Thus it is that we find it necessary to

approach cautiously any reliance upon the decision by the Supreme Court in the intervening period which deals with this confused problem. This is all the more so because the Court, in Lee v. Chesapeake & Ohio R. Co., supra, was construing a section of the statute which appears to us to be as positive a limitation on the place where a suit could be brought as is the language in the Heard and Miller Acts. . . ."

". . . Having concluded that the jurisdictional point is not good because *the statute is a restriction only on venue* rather than on the power of the court to entertain the suit, we do not need to pass on the other grounds on which the district court overruled the plea to the jurisdiction. Thus we do not need to decide whether the fact that some work was done on the contract within the Northern District of Texas would satisfy the requirement of the statute, if it were a jurisdictional statute, that suit be brought 'in any district' in which the contract was to be performed; or whether jurisdiction could be retained because the complaint alleged a cause of action between citizens of different states and the suit was thus not solely a Miller Act case; or that jurisdiction was acquired by the Court, even though not previously existing, when the defendant below filed its counterclaim; nor, finally, that the Northern District had jurisdiction under the jurisdictional statute providing for actions on bonds generally. 28 U.S.C.A. § 1352." (Emphasis added.)

By reason of the above authority, we respectfully submit, the premise upon which the motion for dismissal was made, and, as further stated on page 13 of appellant's brief, "the appellees will obtain an unconscionable advantage and the appellant may be in danger of losing valuable rights under the Miller Act by the denial of the motion," are clearly untenable and without support in law.

It would have been substantial error for the trial court to have allowed the motion for dismissal of this action for the objectives sought by appellant, and over the objections of appellees. The venue was properly in the District Court for Oregon, where appellees reside, and, venue not being waived by them, the trial court was obliged to retain jurisdiction and to proceed with the trial. *Riley v. Union Pac. R. Co.,* supra.

The ends of justice have always required that a defendant be sued in the place of his residence, unless he waives the privilege. This right is safeguarded by statute. 28 USCA 1391(a).

Venue is a litigant's personal privilege granted for a purpose; and, generally, venue relates to convenience of parties and affords defendants some protection against being forced to defend an action at a place far removed from his residence. *Jacobson v. Indianapolis Power & Light Co.,* 163 F. Supp. 218.

Appellant, on page 12 of its brief, deems the right of a defendant to be sued in his own community to be of no great consequence; that it is not a proper factor of consideration in determining the question of whether a court should allow a dismissal of the cause.

The right of a defendant to be sued in the place of his residence is an ancient and valuable right, which has always been safeguarded by statute. As stated in *Neirbo v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 84 L. Ed. 167, 60 S Ct.. 153:

> "But the locality of a law suit—the place where judicial authority may be exercised—though defined

> by legislation relates to the convenience of litigants and as such is subject to their disposition. This basic difference between the Court's power and the litigants convenience is historic in the federal courts."

Congress, in conferring jurisdiction on the district courts in cases based on diversity of citizenship, has been explicit to confine such suits to "the judicial district where all plaintiffs or defendants reside." 28 USC Sec. 1391(a).

By voluntarily bringing its action in the District Court for Oregon appellant relinquished and waived any right to object to the venue. *Olberding v. Illinois Central R. Co.,* 346 U.S. 388, 74 S. Ct. 83, 98 L. Ed. 39; *Riley v. Union Pac. R. Co.,* supra.

Despite appellant's anomalous contention, that appellees' statutory right to defend the action at the place of their residence "is not a proper factor of consideration," it is in a complete variance with appellant's own primary objective in support of its motion for dismissal. To gain more advantages for its own conveniences and oblivious to the real necessities of appellees, irrespective of the heavy burden that would be placed upon them, appellant intended to file an action elsewhere. Congress in enacting 28 USC Sec. 1391 permitting a defendant to have the action against him tried in the judicial district of his residence is liberally construed, to the end that a defendant may not be unjustly deprived of that right.

Whether the lower court reckoned that counsel was hedging during arguments on the motion for dismissal

is not of serious import. Counsel for appellant gave indications that something akin to a game of hounds and fox was contemplated and it was not precisely made clear what future vexatious action was planned if a dismissal was to be authorized. In view of the fact appellant could have lawfully amended its complaint in this case and joined the surety as an additional defendant, pursuant to the authority of *Texas Construction Company and U. S. F. & G. Co., v. United States of America for the use of Caldwell Foundry and Machine Company, Inc.*, supra, there was absolutely no justifiable or valid reason for a dismissal where prejudice would, in fact, result to appellees.

The Rules of Civil Procedure 41(a)(2) manifestly vest in the trial court a reasonable discretion on a motion for a voluntary dismissal, and in the exercise of this discretion, the Court considers the relative positions of the parties and determines whether prejudice will develop therefrom. That prejudice will result to appellees is found (Tr. 36) in the fact that all the records of appellees respecting this action and their witnesses are located in Oregon; also that appellees have made preparations for the trial.

As pointed out in *Ockert v. Union Barge Line Corp.*, 190 F. 2d 303 (3rd):

> ". . . It is likewise an increasingly burdensome matter to one's opponent if a case has been prepared, trial date set and the party and his witnesses on hand and ready for trial. . ."

At one time it was believed that the fact a defendant would only be subjected to annoyance by the filing

of a second litigation was not deemed such substantial prejudice as to deny a plaintiff the right to a voluntary dismissal. Such a belief has now been absolutely discarded, and the day is past when the right of dismissal may be initiated by a plaintiff on an unilateral basis only.

In *Piedmont Interstate Fair Ass'n. v. Bean,* 209 F. 2d 942 (4th), the Court said:

> "The prejudice to the defendant which justifies the Court in refusing permission to the plaintiff to dismiss is more carefully considered, and it is no longer true to say, as was so often said in decisions preceding the Federal Rules, that 'the incidental annoyance of a second litigation upon the subject matter' furnishes no ground for denying the plaintiff permission to dismiss his complaint."

It is also well established law that, the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of right, but is discretionary with the District Court *both* as to whether a dismissal shall be allowed as well as to the terms and conditions to be imposed if allowed. *Adney v. Mississippi Lime Company of Missouri,* 241 F. 2d 43 (7th); *Grivas v. Parmelee Transportation Co.,* 207 F. 2d 334, Cert. denied 347 U.S. 913, 74 S. Ct. 477, 97 L. Ed. 1069.

Appellant assumed a position in the proceedings below which was tantamount to defiance of the order of court to appear for pretrial conference, which made it extremely burdensome upon appellees. A due and proper preparation for any trial requires conferences with witnesses who often are corralled with difficulty, and, too,

those witnesses must be kept available as the exigencies of the case demand.

Also, the efficiency of a court depends on strict observance to its orders, and without it, the administration of justice becomes a mockery. The Civil Rules of Procedure were specifically adopted to expedite the court's business and a party who undertakes to institute and action is duty bound to adhere to those rules. In this case appellant chooses capriciously and without right to move the goal posts to serve its own conveniences and despite the order of court to prosecute with due diligence.

A non-compliance with the Rules of Civil Procedure justifies dismissal of a cause.

Rule 41(2)(b), Rules of Civil Procedure.
Collins v. Wayland, et al, 139 F. 2d 677 (9th).
Mooney v. Central Motor Lines, Inc., 222 F. 2d 569 (6th).
Hubbard v. The B. & O. R. R. Co., 249 F. 2d 885.
Wisdom v. Texas Co., 27 F. Supp. 992.

CONCLUSION

The allowance of a motion to dismiss is a matter for the discretion of the trial court, and since the primary objectives assigned by appellant for a dismissal are untenable and would be improper, the trial court did not act unfairly or arbitrarily in requiring appellant to continue with the prosecution of its action and prepare for pretrial conference.

This Court in denying appellant's petition for a Writ of Mandamus in Case No. 16071, said ". . . in refusing to

permit the action to be dismissed after answer had been filed, (the court) was acting within the limits of discretion . . ." The record in this case on the appeal contains the same facts and circumstances presented in the petition for the writ of mandamus.

There being no clear abuse of discretion the order should be affirmed.

Respectfully submitted,

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